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No. 09-1470

In the Supreme Court of the United States

JAMES L. CHEESEMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly determined that the criminal forfeiture of petitioner's firearms and ammunition did not violate the Excessive Fines Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 600 F.3d 270. The opinion of the district court (Pet. App. 33a-45a) is reported at 593 F. Supp. 2d 682.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 2010. The petition for a writ of certiorari was filed on June 1, 2010 (Tuesday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner entered a plea of guilty in the United States District Court for the District of Delaware to one count of being a drug addict in possession of firearms

and ammunition, in violation of 18 U.S.C. 922(g)(3). Pet. App. 3a. The district court sentenced petitioner to eight months of imprisonment and three years of supervised release. *Id.* at 10a. In addition, the district court ordered petitioner to forfeit approximately 600 firearms and a quantity of ammunition. *Id.* at 3a-10a. The court of appeals affirmed. *Id.* at 1a-32a.

1. From 1994 through 2007, petitioner was the owner and sole proprietor of X-Ring Supply (X-Ring), a sporting goods and firearms store in Newark, Delaware. Pet. App. 4a. X-Ring maintained an inventory of approximately 600 firearms, all of which were kept on the premises, including in a warehouse located next to the store. *Id.* at 4a, 36a-37a. Petitioner also kept his personal collection of firearms on the X-Ring premises, and stored boxes of guns and ammunition in the warehouse. *Id.* at 4a, 36a.

In 2003, petitioner began to abuse drugs. Pet. App. 4a. Petitioner's addiction to crack cocaine worsened between 2005 and 2007, during which time he converted X-Ring's warehouse into his home. *Ibid.* Petitioner stored an air mattress, sleeping bag, and bedding inside the warehouse. *Ibid.* During and after business hours, petitioner occasionally permitted fellow crack users to stay in the warehouse and occasionally turned off X-Ring's security system to allow himself and other crack users easy access to the premises. *Id.* at 4a, 9a, 37a-38a.

In 2005, while he was abusing crack cocaine, petitioner completed a renewal application for his federal firearms license. Pet. App. 4a. On his application, petitioner stated that he did not unlawfully use narcotics. *Ibid.* Also in 2005, petitioner's sister assumed power of attorney over him and assumed management of X-Ring's daily operations in response to petitioner's erratic be-

havior. *Id.* at 5a, 38a-39a. Thereafter, petitioner's presence in the store was sporadic and unpredictable. *Id.* at 5a, 39a. On at least three separate occasions, employees found crack pipes on X-Ring's premises. *Id.* at 5a.

On August 5, 2007, police officers saw a woman urinating in the parking lot of a pharmacy. Pet. App. 5a. The officers found drugs on the woman, who was petitioner's companion. *Ibid.* Petitioner then consented to a pat-down search, during which the officers found a crack pipe and crack cocaine. *Ibid.* A subsequent search of petitioner's car yielded a second crack pipe and additional crack cocaine. *Ibid.* Federal agents later executed a search warrant at X-Ring, where they seized approximately 609 guns (approximately 67 of which were identified as constituting petitioner's personal collection) and ammunition. *Ibid.* The agents also found drug paraphernalia in the warehouse. *Ibid.*

2. On September 13, 2007, a federal grand jury returned a three-count indictment with notice of forfeiture charging petitioner with: (1) possession of a firearm by an unlawful drug user or addict, in violation of 18 U.S.C. 922(g)(3), 924(a)(2); (2) possession of more than five grams of crack cocaine, in violation of 21 U.S.C. 844(a); and (3) distribution of crack cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Pet. App. 5a-6a, 34a. Pursuant to 18 U.S.C. 924(d)(1), the government sought the forfeiture of the 609 seized firearms and a quantity of ammunition that petitioner unlawfully possessed while he was addicted to drugs. Pet. App. 6a.[1]

After petitioner pleaded guilty to violating Section 922(g)(3), the district court held a hearing to determine

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[1] Section 924(d)(1) provides that "[a]ny firearm or ammunition involved in or used in any knowing violation of subsection * * * (g) * * * of Section 922 * * * shall be subject to seizure and forfeiture."

whether the guns and ammunition were forfeitable. Pet. App. 7a, 35a-36a. The district court concluded that petitioner's guilty plea satisfied the elements of a Section 924(d)(1) forfeiture. *Id.* at 8a-10a, 42a-44a. The court also rejected petitioner's argument that the forfeiture would violate the Eighth Amendment's prohibition of excessive fines. *Id.* at 44a-45a. Petitioner contended that the seized firearms were worth approximately $500,000, whereas the government contended that they were worth $371,000. *Id.* at 10a, 44a. Using petitioner's higher figure for the sake of argument, the district court concluded that the forfeiture was not so grossly disproportionate as to run afoul of the Eighth Amendment. *Id.* at 10a, 45a.

3. On appeal, petitioner challenged the forfeiture, arguing that the forfeited property was neither involved nor used in a knowing violation of Section 922(g), and that the forfeiture violated the Excessive Fines Clause of the Eighth Amendment. Pet. App. 10a-11a. The court of appeals rejected both arguments. *Id.* at 11a-30a.

a. The court of appeals first rejected petitioner's statutory argument, holding that the guns at issue were "involved in" the commission of petitioner's Section 922(g)(3) offense within the meaning of Section 924(d)(1). Pet. App. 11a-21a. Petitioner does not renew his statutory arguments in his petition for a writ of certiorari.

b. Turning to petitioner's Eighth Amendment argument, the court of appeals noted that, in *United States* v. *Bajakajian*, 524 U.S. 321, 337 (1998), this Court had held that a forfeiture violates the Excessive Fines Clause if it is "grossly disproportionate to the underlying crime." Pet. App. 26a. In determining that the for-

feiture at issue in *Bajakajian* was unconstitutionally excessive, the court of appeals noted, this Court had considered the nature of the substantive crime; whether the defendant belonged to the class of violators for whom the statutory proscription was principally designed; the degree of punishment, including the maximum fine, recommended by the Sentencing Guideline; the maximum fine authorized by the pertinent statute; and the harm caused by the offense. *Id.* at 27a (citing *Bajakajian*, 524 U.S. at 337-339).

Applying the *Bajakajian* factors, the court of appeals first observed that illegally possessing firearms was not the only substantive crime associated with petitioner's misconduct; he was also abusing illegal drugs. Pet. App. 28a. The court went on to reject petitioner's contention that his crime was "victimless," instead concluding that petitioner's conduct presented a threat to the "public safety." *Ibid.* The court also observed that petitioner, "a crack cocaine addict with unfettered access to an arsenal of weapons and ammunition, who facilitated other crack cocaine addicts' access to that arsenal, squarely fits within the class of persons whose behavior the statute aims to criminalize." *Id.* at 28a-29a.

Finally, the court found that, even assuming that the guns and ammunition were worth $500,000, as petitioner contended, the forfeiture of that property was "not grossly disproportionate to the crime to which [petitioner] pled guilty." Pet. App. 29a. The court acknowledged that that amount was approximately 70 times more than the low end of the fine recommended by the United States Sentencing Guidelines, but noted that it was only seven times greater than the high end of the Guidelines' recommended fine. *Ibid.* By way of contrast, the court of appeals noted that the value of the

forfeited property in *Bajakajian* was 70 times greater than the high end of the Guidelines' recommended fine. *Ibid.* "In any event," the court of appeals concluded, "when considered in light of all the factors that *Bajakajian* instructs courts to consider, the fact that the worth of the guns is a larger sum than the Guidelines fine does not sufficiently outweigh the remaining factors that militate against a finding of unconstitutionality." *Ibid.* The court added that the value of the forfeited property was only twice as great as the maximum fine permitted by the statute. *Id.* at 29a-30a. The court concluded that "any discrepancy" between the value of the forfeited property and the Guidelines fine was "not controlling," and that the forfeiture amount was not "grossly disproportionate" to the Section 922(g)(3) offense in light of all the *Bajakajian* factors. *Id.* at 30a.

ARGUMENT

Petitioner asks this Court to review the court of appeals' holding that the district court's order forfeiting petitioner's firearms and ammunition did not violate the Excessive Fines Clause of the Eighth Amendment. That holding does not merit further review because the court of appeals properly considered all of the factors enumerated by this Court in *United States* v. *Bajakajian*, 524 U.S. 321, 336 (1998), and correctly concluded that the forfeiture was constitutional. In addition, the court of appeals' decision does not conflict with any decision from this Court or from any other court of appeals.

1. a. In evaluating petitioner's Eighth Amendment claim, the court of appeals adhered to the analysis this Court set forth in *Bajakajian*. In that case, the government sought forfeiture of $357,144 in currency that the defendant had attempted to transport out of the country

without reporting it, in violation of 18 U.S.C. 982(a)(1) (which requires an individual to report to the government when he is transporting more than $10,000 out of the country). The question before the Court was whether a forfeiture of the full $357,144 the defendant failed to report would violate the Excessive Fines Clause. After determining that the forfeiture in question was punitive (thereby triggering the protection of the Eighth Amendment), *Bajakajian*, 524 U.S. at 327-334, the Court stated that a forfeiture would violate the Excessive Fines Clause only if it was "grossly disproportional to the gravity of the defendant's offense," *id.* at 337. The Court then considered the fine at issue in that case, and concluded that it was grossly disproportional to the gravity of the reporting offense, and was therefore unconstitutional. *Id.* at 337-340.

In determining the gravity of the defendant's crime—the benchmark against which to measure the magnitude of the forfeiture at issue—the Court in *Bajakajian* considered a number of factors related both to the statutory prohibition involved and to the culpability of the particular defendant. The Court first examined the nature of the crime charged, concluding that it was "solely a reporting offense," 524 U.S. at 337, and was "unrelated to any other illegal activity," *id.* at 338. Second, the Court took account of the fact that the defendant did "not fit into the class of persons for whom the statute was principally designed," because he was "not a money launderer, a drug trafficker, or a tax evader." *Ibid.* Third, the Court compared the value of the forfeited property to the penalties dictated by the Sentencing Guidelines for the particular defendant. In that case, the maximum fine under the Guidelines was $5000 and the maximum sentence under the Guidelines

was six months, which the Court took to "confirm a minimal level of culpability." *Id.* at 339. Fourth, the Court noted that the maximum penalties authorized in the statute at issue also are "relevant" to the analysis, and concluded that Congress's authorization of a $250,000 fine and five years of imprisonment indicated that Congress did not regard the offense as "trivial." *Id.* at 339 n.14. Taking the third and fourth factors together, the Court explained that "the maximum fine and Guidelines sentence to which respondent was subject were but a fraction of the penalties authorized" by the statute, which "undercut[] any argument based solely on the statute, because [it] show[ed] that respondent's culpability relative to other potential violators of the reporting provision—tax evaders, drug kingpins, or money launderers, for example—[was] small indeed." *Ibid.* Finally, the Court considered the harm caused by the defendant's offense and concluded that it was "minimal," both because the government was the sole party affected and because the only harm inflicted was depriving the government of the information that the respondent failed to report. *Id.* at 339.

Petitioner argues (Pet. 9-10, 19-21) that the court of appeals erred in evaluating the factors considered in *Bajakajian* because it did not give greater weight to the maximum fine authorized by the Guidelines than it did to the maximum fine authorized by the statute, 18 U.S.C. 922(g)(3). Petitioner also argues (Pet. 10-18) that the approach taken by the court of appeals conflicts with the decisions of other courts of appeals. Petitioner is incorrect on both counts.

b. This Court in *Bajakajian* did not suggest that the differential between the value of forfeited property and the maximum fine applicable under the Guidelines must

be given more weight than any other factor relevant to the gross-disproportionality assessment. In the Court's own words, the Guidelines penalties "confirm[ed]" what was already reflected by other factors, namely, that the defendant's level of culpability was minimal in that case. 524 U.S. at 338-339. The Court did state that the disparity between the maximum Guidelines fine ($5000) and the maximum statutory fine ($250,000) would "undercut" any argument in support of the forfeiture that was based "solely" on the statutory maximum. *Id.* at 339 n.14. But the Court did not assign relative weights to the various factors it considered and did not suggest that the Guidelines maximum will invariably be more important than the statutory maximum or any other factor.

Nothing in the court of appeals' decision conflicts with the decision in *Bajakajian*. Like this Court in *Bajakajian*, the court of appeals considered all of the relevant factors in examining whether the value of the forfeited property was grossly disproportional to the seriousness of petitioner's crime. Pet. App. 28a-30a. Those factors included the nature of petitioner's criminal behavior, whether petitioner's crimes were victimless, and whether petitioner was the type of individual Congress had in mind when it enacted 18 U.S.C. 922(g)(3). Pet. App. 28a-29a. The court of appeals also considered the differential between the maximum fine recommended by the Guidelines ($75,000) and the value petitioner claimed for the forfeited property ($500,000). *Id.* at 29a. The court noted that the value of the forfeited property was less than seven times greater than the maximum Guidelines fine, while the value of the forfeited property in *Bajakajian* was more than 70 times greater than the maximum Guidelines fine. *Ibid.* (citing *Bajakajian*, 524 U.S. at 337-338). The court of appeals

considered the smaller differential in this case "in light of all the factors that *Bajakajian* instructs courts to consider" and concluded that "the fact that the worth of the guns is a larger sum than the Guideline fine does not sufficiently outweigh the remaining factors that militate against a finding of unconstitutionality." *Ibid.* The court of appeals also considered the maximum fine authorized by Section 922(g)(3) itself, noting that it was half as large ($250,000) as the assumed value of the forfeited property. *Id.* at 29a-30a. But petitioner errs in suggesting (Pet. 14) that the court of appeals erroneously gave "minimal weight to [petitioner's] Guidelines fine range." The court of appeals considered all of the factors enumerated in *Bajakajian*, and concluded that, in this case, the maximum fine recommended by the Guidelines was "not controlling" when weighed against all of the other relevant factors, including the maximum fine authorized by the statute. Pet. App. 30a.

Petitioner is incorrect (Pet. 16-21) that, in declining to give the maximum Guidelines fine controlling weight, the court of appeals failed to give petitioner the individualized consideration required by *Bajakajian*. Most of the *Bajakajian* factors consider the circumstances of the individual defendant, and the court of appeals gave full consideration to those factors here. *E.g.*, Pet. App. 28a (petitioner's criminal conduct); *ibid.* (petitioner "is exactly the type of individual for whom the statute was designed").

c. As petitioner notes (Pet. 12-16), some courts of appeals have suggested that the maximum Guidelines fine should carry more weight than the maximum statutory fine in evaluating the *Bajakajian* factors. See *Von Hofe* v. *United States*, 492 F.3d 175, 187 (2d Cir. 2007); *United States* v. *Beras*, 183 F.3d 22, 27 n.5 (1st Cir.

1999); *United States* v. *3814 NW Thurman St.*, 164 F.3d 1191, 1198 (9th Cir. 1999). But those cases do not conflict with the decision here, which does not hold otherwise. The court of appeals here merely found that the maximum Guidelines fine did not control the overall gross-disproportionality analysis, a point on which petitioner does not claim the circuits are divided. Nor is it apparent that the court of appeals gave greater weight to the statutory maximum fine than to the Guidelines maximum fine. On the contrary, the court of appeals expressly noted that it was weighing the Guidelines fine against "all the factors that *Bajakajian* instructs courts to consider." Pet. App. 29a. Petitioner identifies no court of appeals case holding or even suggesting that the maximum Guidelines fine should be the most important or controlling factor. Rather, courts have recognized that the weight accorded to the various factors should vary from case to case, depending on the circumstances. See, *e.g.*, *Von Hofe*, 492 F.3d at 186 (excessiveness determination is "fact-intensive"; it is "impossib[le to] establish a formula for an excessive fine with surgical precision"); *United States* v. *Mackby*, 339 F.3d 1013, 1016 (9th Cir. 2003) (*Bajakajian* test not "rigid"), cert. denied, 541 U.S. 936 (2004); *United States* v. *Carpenter*, 317 F.3d 618, 627 (6th Cir. 2003) (authorized penalties are "but one of several factors"), rehearing en banc granted and opinion reinstated in relevant part, 360 F.3d 591, 593 (6th Cir.) (en banc), cert. denied, 543 U.S. 851 (2004).

2. Petitioner also seeks review (Pet. 21-27) of the court of appeals' ultimate ruling (based on the factors enumerated in *Bajakajian*) that the forfeiture in this case did not violate the Excessive Fines Clause. Fur-

ther review of that ruling is not warranted because the ruling is fact-bound and correct.

In determining that the forfeiture of petitioner's firearms and ammunition did not violate the Excessive Fines Clause of the Eighth Amendment. The court first considered the nature of the criminal conduct at issue. Pet. App. 28a-29a. Section 922(g)(3) (which petitioner pleaded guilty to violating) prohibits the possession of firearms by an individual who is addicted to illegal drugs. As the court of appeals correctly noted, therefore, petitioner's illegal conduct involved not only the illegal possession of hundreds of guns, but also the abuse of illegal drugs. *Id.* at 28a. The court went on to conclude that petitioner "is exactly the type of individual for whom [Section 922(g)(3)] was designed." *Ibid.* Section 922(g)(3), the court stated, reflects Congress's "eminently reasonable" determination "that certain types of individuals, including drug abusers, mental incompetents, and violent felons, should not possess firearms." *Ibid.* Thus, petitioner, "a crack cocaine addict with unfettered access to an arsenal of weapons and ammunition, who facilitated other crack cocaine addicts' access to that arsenal, squarely fits within the class of persons whose behavior the statute aims to criminalize." *Id.* at 28a-29a. The court also noted that petitioner engaged in further illegal activity when he falsely certified on an application for renewal of his federal license to sell firearms (in violation of both 18 U.S.C. 924(a)(1)(A) and 18 U.S.C. 1001) that he was not an unlawful user of drugs or a drug addict. Pet. App. 29a.

Although no person was actually injured by petitioner's offense, petitioner's conduct created a high risk of serious harm. The evidence showed that petitioner was a long-time crack addict with unfettered access to

an arsenal of weapons and ammunition; that he used crack on the premises in which he stored his inventory; that he allowed other crack addicts to use drugs on the premises, affording them access to the arsenal; and that he deactivated the store's security system in order to facilitate the use of the premises by his crack-addicted friends. Pet. App. 4a-5a, 36a-42a.

The court of appeals also properly took account of the fact that the assumed value of the forfeited property ($500,000) was twice as large as the maximum fine authorized by statute ($250,000), see 18 U.S.C. 3571(b)(3), and nearly seven times as large as the maximum fine authorized by the Sentencing Guidelines for petitioner's offense level of 21 ($75,000), see Sentencing Guidelines §§ 2K2.1(a)(6) and (b)(1), 5E1.2(c)(3). In contrast, the value of the forfeited property in *Bajakajian* was 70 times as large as the maximum Guidelines fine. Nor does petitioner's offense level under the Guidelines—which are only advisory, see *United States* v. *Booker*, 543 U.S. 220 (2005)—adequately account for petitioner's status as a licensed firearms dealer entrusted by the government to operate his business safely and legally; his fraudulent renewal of his firearms license; the prolonged nature of the offense, during which petitioner continued to acquire firearms illegally; or the serious threat to the public safety created by petitioner's misconduct. Thus, proper consideration of the relevant factors supports the court of appeals' determination that the forfeiture was not grossly disproportional to the gravity of petitioner's offense.[2]

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[2] In addition, this case differs from *Bajakajian* because it involves the forfeiture of contraband. In *Bajakanian*, the defendant lawfully possessed the currency that he failed to report, and it was legal for him to remove the currency from the country. In the instant case, in con-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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trast, it was illegal for petitioner to possess every weapon he possessed while he was addicted to crack cocaine. The forfeiture of such contraband thus has a remedial purpose that militates strongly in favor of its constitutionality. See *Austin* v. *United States*, 509 U.S. 602, 621 (1993) (noting that this Court has "recognized that the forfeiture of contraband itself may be characterized as remedial because it removes dangerous or illegal items from society"); see also *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984) (Section 924(d) "furthers broad remedial aims").